

**DATA PROTECTION ACT 2018  
(PART 6, SECTION 149)**

**ENFORCEMENT POWERS OF THE INFORMATION COMMISSIONER**

**ENFORCEMENT NOTICE**

**DATED: 19 FEBRUARY 2024**

To: Birmingham Community Leisure Trust Limited  
Of: Office 6 Town Hall, 86 Watling Street East, Towcester, Northants,  
NN12 6BS

1. Birmingham Community Leisure Trust Limited (Registration number **31748R**) (the **Trust**) is a “controller” as variously defined in section 3(6) of the Data Protection Act 2018 (“**DPA**”) and Articles 4(7) of the UK General Data Protection Regulation (“**UK GDPR**”).
2. In accordance with Article 26 of the UK GDPR, for the purposes of this Notice, the Trust is a “joint controller” with Serco Leisure Operating Limited (Companies House number **04687478**) (**Serco**).
3. The Information Commissioner (“the **Commissioner**”) issues this Enforcement Notice to the Trust under section 149(2)(a) and (c) of the DPA. The Notice is in relation to contraventions of Articles 5(1)(a), 6 and 9 of the UK GDPR.
4. This Notice explains the Commissioner’s decision. The steps that the Trust is required to take are set out in Annex 1.

5. The Commissioner has previously served the Trust with a Preliminary Enforcement Notice ("the PEN") dated 7 November 2023. Serco provided written representations, on behalf of itself and the Trust, with whom it acts as joint controller (as described below) ("the Representations") in response to the PEN on 5 December 2023. The Commissioner has taken the Representations into account when deciding to issue this Notice and refers to the Representations below when appropriate.

### **Legal framework for this Notice**

6. The DPA contains various enforcement powers in Part 6, which are exercisable by the Commissioner.
7. Section 149 of the DPA 2018, materially provides:

*"(1) Where the Commissioner is satisfied that a person has failed, or is failing, as described in subsection (2), (3), (4) or (5), the Commissioner may give the person a written notice (an "enforcement notice") which requires the person—*

- (a) to take steps specified in the notice, or*
- (b) to refrain from taking steps specified in the notice, or both (and see also sections 150 and 151).*

*(2) The first type of failure is where a controller or processor has failed, or is failing, to comply with any of the following—*

- (a) a provision of Chapter II of the [UK] GDPR... (principles of processing);*
- (b) ...; and*

*(c) a provision of Articles 25 to 39 of the [UK] GDPR...  
(obligations of controllers and processors)*

...

*(6) An enforcement notice given in reliance on subsection (2)...  
may only impose requirements which the Commissioner considers  
appropriate for the purpose of remedying the failure."*

8. Section 150 of the DPA, materially provides:

*"(1) An enforcement notice must—*

- (a) state what the person has failed or is failing to do, and*
- (b) give the Commissioner's reasons for reaching that  
opinion.*

*(2) In deciding whether to give an enforcement notice in reliance  
on section 149(2), the Commissioner must consider whether the  
failure has caused or is likely to cause any person damage or  
distress.*

*(3) In relation to an enforcement notice given in reliance on section  
149(2), the Commissioner's power under section 149(1)(b) to  
require a person to refrain from taking specified steps includes  
power—*

- (a) to impose a ban relating to all processing of personal  
data, or*
- (b) to impose a ban relating only to a specified description of  
processing of personal data, including by specifying one or  
more of the following—*
  - (i) a description of personal data;*
  - (ii) the purpose or manner of the processing;*
  - (iii) the time when the processing takes place.*

...

*(4) An enforcement notice may specify the time or times at which, or period or periods within which, a requirement imposed by the notice must be complied with (but see the restrictions in subsections (6) to (8))."*

9. Article 4(14) of the UK GDPR sets out a definition of "biometric data" as follows:

*"personal data resulting from specific technical processing relating to the physical, physiological or behavioural characteristics of a natural person, which allow or confirm the unique identification of that natural person, such as facial images or dactyloscopic data".*

10. Article 26(1) of the UK GDPR provides that:

*"Where two or more controllers jointly determine the purposes and means of processing, they shall be joint controllers. They shall in a transparent manner determine their respective responsibilities for compliance with the obligations under this Regulation, in particular as regards the exercising of the rights of the data subject and their respective duties to provide the information referred to in Articles 13 and 14, by means of an arrangement between them unless, and in so far as, the respective responsibilities of the controllers are determined by domestic law. The arrangement may designate a contact point for data subjects."*

11. By reason of Article 5(1), the UK GDPR includes the following requirement:

*"5(1)(a) personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject ("lawfulness, fairness and transparency")"*

12. Article 6 of the UK GDPR makes provision for the lawfulness of processing. In particular for the purposes of this Notice, it provides that:

*"Processing shall be lawful only if and to the extent that at least one of the following applies:*

*...*

*(b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;*

*...*

*...*

*...*

*(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data..."*

13. Article 9(1) of the UK GDPR, provides:

*"(1) Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited."*

14. Article 9(2) of the UK GDPR materially provides:

*"Paragraph 1 shall not apply if one of the following applies:*

*...*

*(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by domestic law or a collective agreement pursuant to domestic law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;*

*..."*

15. Schedule 1, Part 1 Paragraph 1 of the DPA makes further provision for the application of Article 9(2)(b) of the UK GDPR, as follows:

*"(1) This condition is met if -*

- (a) the processing is necessary for the purposes of performing or exercising obligations or rights which are imposed or conferred by law on the controller or the data subject in connection with employment, social security or social protection, and*
- (b) when the processing is carried out the controller has an appropriate policy document in place (see paragraph 39 in Part 4 of this Schedule)"*

16. Schedule 1, Part 4, Paragraph 39 of the DPA provides that:

*"The controller has an appropriate policy document in place in relation to the processing of personal data in reliance on a condition*

[in Part 1, 2 or 3 of the Schedule which requires the controller to have an appropriate policy document in place] *if the controller has produced a document which –*

- (a) *explains the controller's procedures for securing compliance with the principles in Article 5 of the GDPR..., and*
- (b) *explains the controller's policies as regards the retention and erasure of personal data processed in reliance on the condition, giving an indication of how long such personal data is likely to be retained."*

## **Background**

17. The Trust is a leisure trust which operates 9 large public sports and leisure facilities.
18. Serco is a large multinational organisation specialising in the delivery of public services, including, for the purposes of this Notice, leisure services. Serco operates leisure facilities on behalf of community leisure trusts, local authorities and Sport England.
19. Serco provides leisure services to the Trust at the following facilities (the **Relevant Facilities**):
  - a) Beeches Pool and Fitness Centre
  - b) Billesley Tennis and Fitness Centre
  - c) Cocks Moors Woods Leisure Centre
  - d) Erdington Leisure Centre
  - e) Fox Hollies Leisure Centre
  - f) Northfield Leisure Centre
  - g) Ladywood Leisure Centre
  - h) Stechford Leisure Centre

- i) Wyndley Leisure Centre
20. As part of the operation of the Relevant Facilities on behalf of the Trust, Serco runs the day-to-day management of the centres' employees. Some employees are employed by Serco, whilst others may be employed by the Trust.
  21. The Trust and Serco are joint controllers (as defined in Article 26(1) of the UK GDPR) for the processing of employee data in connection with the running and management of the Relevant Facilities. A Data Protection Agreement is in place between the Trust and Serco setting out the terms of the joint controllership arrangement.
  22. By virtue of the joint controllership relationship between the Trust and Serco, the Trust is jointly liable with Serco for any infringements of the UK GDPR and/or the DPA in respect of the processing of employee data in connection with the running and management of the Relevant Facilities, including the processing and the contraventions identified in this Notice.
  23. The Trust and Serco, as joint controllers, process biometric data (as defined at Article 4(14) of the UK GDPR) at the Relevant Facilities, for the purpose of monitoring employee attendance. Facial recognition technology (**FRT**) is in use at the Relevant Facilities.
  24. The FRT scanning systems are provided by SWT Software Limited, trading as ShopWorks, which acts as a processor (as defined at Article 4(8) of the UK GDPR) on behalf of the Trust and Serco as joint controllers.

25. On 2 December 2019, a referral to the Information Commissioner's Office Civil Investigations department was made after an employee of the Information Commissioner's Office observed FRT in use at another facility managed by Serco. The Commissioner subsequently opened an investigation into Serco's processing of biometric data (**Investigation**).
26. The Investigation found the following material facts:
  - a) The Trust and Serco are joint controllers for the processing of biometric data using the FRT system.
  - b) The Trust and Serco were using, and continue to use, FRT to collect special category personal data for the purpose of employment attendance checks and subsequent payment for employees' time worked.
  - c) The FRT system works by registering employees onto an FRT scanner, by having their photograph taken by the scanner three times. The scanner uses the images to create a biometric map based on the employee's facial features. This map is encrypted and held within the scanner itself, which also holds a record of the employee's name and staff number. When an employee activates the scanner, it captures an image of the employee, converts this into a biometric map and attempts to match this against the maps stored on the device. If the scanner finds a match, it passes the employee's staff number, match time and location to the ShopWorks server and deletes the captured image. If the scanner does not find a match, it deletes the captured image. A manager reviews and approves all employee hours recorded by the scanner at the end of each day and these can then be viewed on an employee self-service portal.

- d) The Trust and Serco introduced biometric technology because Serco considered that previous systems were open to abuse by employees. Serco explained to the Commissioner in its responses to enquiries and Representations that manual sign-in sheets were prone to human error and abused by a minority of employees. Serco also explained that radio-frequency identification cards were used inappropriately by employees at one facility, where cards were shared and kept in communal areas. Serco did not provide any figures or evidence indicating the number of employees “abusing the system”. It is not known whether the facility at which this occurred was one of the Relevant Facilities for the purposes of this Notice.
- e) Serco considers that using biometric technology is the only way to prevent these abuses of the system from happening in practice. Serco advised the Commissioner that: *“biometrics is the sole technology capable of eliminating buddy punching and falsified time cards”* and that biometric solutions are *“more accurate and secure than cards or keys, because a fingerprint or face scan cannot be lost, stolen or (easily) replicated.”*
- f) Serco has produced both a data protection impact assessment (**DPIA**) and a legitimate interests assessment (**LIA**) for the processing. The LIA was conducted after the roll-out of the technology and following contact from the Commissioner. The Trust and Serco have identified the lawful bases for the processing as Article 6(1)(b) of the UK GDPR (contractual necessity) and Article 6(1)(f) of the UK GDPR (legitimate interests). The Trust and Serco have identified the relevant processing condition for special category personal data as

Article 9(2)(b) of the UK GDPR (employment, social security and social protection), on the basis that the Trust and Serco need to process attendance data to comply with a number of regulations, such as working time regulations, national living wage, right to work rules and tax/accounting regulations.

- g) Serco advised the Commissioner that if an employee raises concerns regarding the use of biometric technology, and does not wish to use it, an alternative process will be considered. Serco stated that an alternative process has been used once where the scanner was unable to recognise an employee, but have not specified what alternative process would be available (though this could include the use of a pass or card). Serco's original LIA (dated 24 March 2020) stated that "*an opt out would be unsuitable*" for the processing. This was updated on 28 April 2021 to confirm that an alternative process would be considered if an employee were to raise concerns. However, this policy was not in place for some time whilst biometric technology was in use.
- h) Taking into account documents and responses provided to the Commissioner by Serco, the information given to employees is not clear as to whether they are able to object to the processing in practice. Serco's Leisure Standard Operating Procedure (**LSOP**) states that: "*All employees based on a Contract are expected to use the ShopWorks platform*". The LSOP further outlines the consequences of refusing to use the system (rather than objecting to its use): "*All staff are ... required to comply to use of tools in place to accurately enable capture of time and attendance. Non-compliance or refusal to enrol may lead to an investigation and it may escalate to disciplinary action for failure*

*to follow a reasonable line management instruction and operating requirement.”*

- i) When one affected data subject complained to Serco about the use of FRT, Serco did not offer an alternative and instead offered to arrange a meeting between the affected data subject and a ShopWorks representative to discuss privacy concerns. The data subject was informed that they would "*be required to use the ShopWorks... system*" on their return to work.
- j) As per the DPIA, Serco has informed the Commissioner that the Trust signed off on the use of biometric technology for employee attendance monitoring purposes.

### **The contravention**

- 27. In light of the above and on consideration of the Representations, the Commissioner finds that the Trust has contravened Articles 5 (1) (a), 6 and 9 of the UK GDPR in that in its role as a joint controller, it has failed to establish a lawful basis and special category personal data processing condition for the processing of biometric data as required by Articles 5(1)(a), 6 and 9.

### **Article 6 – lawful basis for processing**

- 28. The Trust and Serco purport to rely on Article 6(1)(b) (contractual necessity) and Article 6(1)(f) (legitimate interests).
- 29. Regarding the Trust's and Serco's reliance on Article 6(1)(b), Serco states that the processing of attendance data is necessary to ensure employees are paid correctly for the time they have worked. Although recording attendance times may be necessary for Serco

to fulfil its obligations under employment contracts, it does not follow that the processing of biometric data is necessary to achieve this purpose. The processing of biometric data cannot be considered “necessary” when less intrusive means could be used to verify attendance. The less intrusive means of recording attendance times that are available to the Trust and Serco include using radio-frequency identification cards or fobs, or manual sign-in and sign-out sheets. The Trust and Serco have failed to demonstrate why these less intrusive methods are not appropriate. Despite Serco’s assertions that these methods are open to abuse, Serco has not been able to provide evidence of widespread abuse, nor why other methods, such as disciplinary action against employees found to be abusing the system, have not been considered to be appropriate. The Trust and Serco cannot rely on Article 6(1)(b) to process biometric data, as the availability of less intrusive methods of recording attendance data means that this processing is not necessary in order for the Trust and/or Serco to fulfil its employment contracts.

30. Regarding the Trust’s and Serco’s reliance on Article 6(1)(f), Serco identifies the legitimate interests as:
  - a) *"to ensure Serco are paying staff members the correct salary for the time worked;*
  - b) *"to support our administrative and business functions."*
31. Legitimate interests will not apply if a controller can reasonably achieve the same result in another less intrusive way. As described above, Serco has not provided enough information to support its argument that eliminating abuse of the attendance monitoring system is a necessity, rather than simply a further benefit to the

Trust or Serco. There is a lack of evidence from Serco of any consideration of alternative means of handling such abuse, for example taking disciplinary action against the individuals responsible (which Serco acknowledges constitute only a minority of employees). Whilst “necessity” does not mean that the processing must be “absolutely essential”, it must be more than just “useful” and be a targeted and proportionate way of achieving the purpose. In this case, the use of biometric technology to monitor attendance is not a targeted means of paying employees correctly or a proportionate method of overcoming the issue of a small number of employees having abused previous systems.

32. In applying the balancing test required to rely on legitimate interests, the Trust and Serco have failed to give appropriate weight to the intrusive nature of biometric processing or the risks to data subjects.
33. The Trust and Serco cannot rely on Article 6(1)(f) as Serco has failed to demonstrate the necessity of the processing or give appropriate weight to the interests of data subjects when conducting the balancing test. Less intrusive means of achieving the results are available. Legitimate interests is not an appropriate lawful basis as:
  - a) The processing has a substantial privacy impact. Biometric data is inherently sensitive due to its uniqueness to the person to whom it relates, and the increased potential for harm if that data is compromised (for example, allowing access to further sensitive and private data such as bank accounts). In this case, employees are required to provide biometric data that will be processed regularly and systematically as part of their

employment. This is a regular intrusion into employees' privacy, over which they have no, or minimal, control.

- b) Employees were not given clear information about how they could object to the processing, or about any alternative methods of monitoring attendance that did not involve intrusive processing.
- c) There is an imbalance of power between Serco, as employer, and the employees. This means that even if employees had been informed that they could object to the processing, the Commissioner considers that they may not have felt able to do so.

*Article 9 – special category personal data processing condition*

- 34. The Trust and Serco sought to rely on Article 9(2)(b) as the processing condition for processing special category personal data however initially failed to identify the specific obligation or right conferred by law. Serco's Representations identified the relevant laws in the context as:
  - a) Section 9 of the Working Time Regulations 1998, which requires employers to keep adequate records of timekeeping; and
  - b) the Employment Rights Act 1996 relating to the correct payment of wages, including the right under Section 13 of that Act for the worker not to suffer unauthorised deductions from their wages.
- 35. However, these were not identified at the time the Trust and Serco began processing data using the FRT system, nor did Serco refer

to these laws in its responses to enquiries during the Commissioner's investigation. The Article 9(2)(b) processing condition does not cover processing to meet purely contractual employment rights or obligations.

36. The Trust and Serco have not produced an appropriate policy document as required by Schedule 1, Paragraph 1(1)(b) of the DPA.
37. The Trust and Serco have also, as described above, failed to demonstrate that the processing of biometric data is "necessary" for Serco to process special category data for the purpose of employment attendance checks or to comply with the relevant laws identified in the Representations.
38. The Trust and Serco cannot rely on Article 9(2) to process biometric data using FRT scanning technology.

*Article 5(1)(a) – lawful, fair and transparent processing*

39. In failing to establish a lawful basis and processing condition under Articles 6 and 9 respectively, the Trust and Serco have failed to comply with their obligations under Article 5(1)(a) to process the biometric data lawfully.
40. The Commissioner also finds that the Trust and Serco have failed to process personal data fairly in accordance with their Article 5(1)(a) obligations. The processing of biometric data is highly intrusive and has the potential to cause distress to data subjects. Although Serco has stated that alternative mechanisms for employees to log their attendance will be available, this is not clearly brought to employees' attention, even when an employee

has complained. In fact, the LSOP explains that employees are “expected” to use the biometric technology, that the use of the biometric technology is a requirement and that employees could be subject to disciplinary action if they refuse to use it. The LSOP does not set out how data subjects could object to any processing.

41. The Commissioner also considers that, due to the imbalance of power between Serco and/or the Trust (as employer) and its employees, it is unlikely that an employee would feel able to object to this processing. It is also not made clear to data subjects how they can make such an objection.

*Are the contraventions identified deliberate or negligent?*

42. Although the use of FRT and processing of biometric data are deliberate, the Commissioner considers that the resulting infringements are negligent. Serco appears to have sought to comply with data protection legislation in its deployment of biometric technology, but its failure to meet these requirements indicates a lack of understanding of the UK GDPR.
43. The Trust, as a joint controller, is also considered to have been negligent in its decision to sign off on the implementation of technology that does not meet the requirements of the legislation.

**Issue of the Notice**

44. The Commissioner has considered, as he is required to do under section 150(2) the DPA when considering whether to serve an Enforcement Notice, whether any contravention has caused or is likely to cause any person damage or distress. The Commissioner

has decided that the processing of biometric data in these circumstances is either causing and/or likely to cause distress to data subjects. The processing of biometric data is, by nature, highly intrusive. Due to the imbalance of power between the Trust and Serco (as employers) and their employees, the relevant data subjects are in a vulnerable position. There is evidence that distress has been caused to data subjects, including the receipt by Serco and the ICO of a complaint relating to the processing.

45. Having regard to the contraventions, Serco's responses to the Commissioner's enquiries, Serco's Representations and the duration of the infringement, the Commissioner considers that an Enforcement Notice would be a proportionate regulatory step to bring the Trust into compliance. The Commissioner requires the Trust to take the steps specified in Annex 1 of this Notice.

**Consequences of failing to comply with an Enforcement Notice**

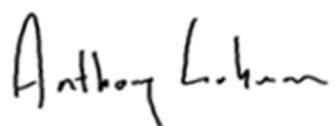
46. If a person fails to comply with an Enforcement Notice, the Commissioner may serve a penalty notice on that person under section 155(1)(b) of the DPA 2018, requiring payment of an amount up to £17,500,00 or 4% of an undertaking's total annual worldwide turnover, whichever is the higher.

**Right of Appeal**

47. By virtue of section 162(1)(c) of the DPA 2018, there is a right of appeal against this Notice to the First-tier Tribunal (Information Rights), part of the General Regulatory Chamber. Information about appeals is set out in the attached Annex 2.

Dated the 19th day of February 2024

Signed:

A handwritten signature in black ink, appearing to read "Anthony Luhman". The signature is fluid and cursive, with "Anthony" on top and "Luhman" below it.

Anthony Luhman  
Temporary Director of Investigations  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF

## **ANNEX 1**

### **TERMS OF THE ENFORCEMENT NOTICE**

By no later than the date three months from the date of the Enforcement Notice the Trust shall take the following steps:

1. Cease, or arrange for the cessation of, all processing of biometric data for the purpose of employment attendance checks from all Relevant Facilities (and not implement biometric technology at any further facilities).
2. Arrange for the destruction of all biometric data and all other personal and special category data that the Trust is not legally obliged to retain, including any such data stored by, or on behalf of, the Trust and Serco as joint controllers (including instructing SWT Software Limited to delete any such data held on behalf of the Trust and Serco as joint controllers).

## **ANNEX 2**

### **RIGHTS OF APPEAL AGAINST DECISION OF THE COMMISSIONER**

1. Section 162(1)(c) of the DPA gives any person upon whom an Enforcement Notice has been served a right of appeal to the First-tier Tribunal (Information Rights) (the "**Tribunal**") against the Enforcement Notice.
2. If you decide to appeal and if the Tribunal considers: -
  - a) that the Enforcement Notice against which the appeal is brought is not in accordance with the law; or
  - b) to the extent that the Notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently
3. The Tribunal will allow the appeal or substitute such other decision as could have been made by the Commissioner. In any other case the Tribunal will dismiss the appeal.
4. You may bring an appeal by serving a notice of appeal on the Tribunal at the following address:

General Regulatory Chamber  
HM Courts & Tribunals Service  
PO Box 9300  
Leicester  
LEI 8DJ  
Telephone: 0203 936 8963

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

5. Any notice of appeal should be served on the Tribunal within 28 days of the date on which the Enforcement Notice was sent.